No. 82-1050

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

ROBERT H. MATHEWS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

REPLY BRIEF FOR THE APPELLANT

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TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—Continued:

Page

Cases—Continued:

Page

Constitution, statutes and regulations:

Page

Miscellaneous:

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At issue in this case is the pension offset section of the Social Security Amendments of 1977, Pub. L. No. 95-216, § 334, 91 Stat. 1544, 42 U.S.C. (Supp. V) 402 & note. The district court held unconstitutional two provisions of the statute. First, the court invalidated the exception clause (§ 334(g)(1), 91 Stat. 1546) to the pension offset as a violation of due process because it incorporated the gender-based dependency standard that existed in the Social Security Act prior to *Califano* v. *Goldfarb*, 430 U.S. 199 (1977). In addition, the court struck down on separation-of-powers grounds the severability clause (§ 334(g)(3), 91 Stat. 1547) that provides that, if the exception is held invalid, the offset should remain in effect and the exception should be eliminated in its entirety. Based on these rulings, the district court extended the exception to apply to nondependent men such as appellee and thereby entitled them to receive dual government pension and Social Security spousal benefits.

In our opening brief we demonstrated that the district court correctly construed the exception clause to incorporate the gender-based standard of pre-*Goldfarb* law. However, the court erred in concluding that this classification, in the context of the exception clause, violates due process. In contrast to the provision invalidated in *Goldfarb*, the exception clause does not rest on stereotypes and outdated assumptions regarding women but instead is substantially related to the important governmental objective of protecting the reliance interests of retirees who had planned their retirements under pre-*Goldfarb* law. Furthermore, the severability clause is a valid expression of legislative intent on the meaning and application of the statute in the event the exception is held invalid in any respect. Thus, if the exception is unconstitutional, the severability clause renders the offset applicable without qualification, and the district court erred in enlarging the scope of the exception and extending dual benefits to appellee's class in the face of Congress's express directive to the contrary.

1. Relying upon the maxim that a court should adopt a reasonable construction of a statute that avoids constitutional questions, appellee urges (Br. 15-25) that, as a matter of interpretation, the exception clause should be read not to incorporate the gender-based dependency test in pre-*Goldfarb* law. Accordingly, he contends that the exception is applicable to nondependent men.

This contention is plainly wrong. Indeed, appellee's treatment of the issue is most notable for the fact that it virtually ignores the legislative history of the statute. Apart from describing the course of the legislation through Congress (Appellee Br. 17-19 n.11), appellee refers to the history and congressional understanding of the statute only in passing (*id.* at 19-20 n.12). As we demonstrated in our opening brief (Gov't Br. 15-27), the history of the statute, as well as its language, overwhelmingly establishes that the exception

incorporates the pre-*Goldfarb* standard and was specifically intended to exclude nondependent men. In light of that discussion, it is simply untenable for appellee to assert that there was "no intent by Congress to limit the operation of the exception clause by factoring out * * * men" (Appellee Br. 18-19) and that "[t]he legislative history of the exception clause evidences a primary congressional concern for men like Mr. Mathews" (*id.* at 19 n. 12).[1]

Moreover, appellee's argument fails to accord any significance to Congress's choice of January 1977 — a time prior to the *Goldfarb* decision — as the operative date in the exception clause. The only plausible explanation for this provision is that Congress, mindful of the March 1977 decision in *Goldfarb*, deliberately designed the exception to incorporate the gender-based dependency test in pre-*Goldfarb* law. See Gov't Br. 24-27. And, contrary to appellee's contention, the statutory language makes clear that it is the law "as it was in effect and being administered in January 1977" (§ 334(g)(1)), not the law "at the point in time in which the exception clause was enacted" (Appellee Br. 22), that is controlling; in January 1977, the Social Security Act required men but not women to prove dependency in order to qualify for spousal benefits (see Gov't Br. 2, 17).

Finally, appellee's interpretation would defeat the fundamental purpose of the statute. Under his view, men and women equally would fall within the exception clause, and the only people who would be excluded from the exception—and hence subject to the offset—would essentially be those

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[1]Appellee argues (Br. 17) that Congress would have explicitly included a dependency requirement in the exception clause if it had intended to impose a gender-based standard. However, Congress's approach of incorporating the pre-existing standards of January 1977—which encompass criteria other than dependency — serves to reinforce its conception that reliance on prior law, rather than gender, was the principle underlying the exception clause.

in categories that were not entitled to spousal benefits when the statute was enacted in December 1977 but that subsequently were made eligible for benefits (see Appellee Br. 23-24). Because it would render the offset inapplicable to then-existing beneficiary categories, appellee's interpretation is irreconcilably at odds with Congress's intent to eliminate the windfall benefits for nondependent men and ease the severe financial burden on the Social Security trust fund that resulted from the *Goldfarb* decision. In fact, his construction would leave the Social Security system in the same fiscal plight that prompted congressional action in the first place. And appellee has pointed to nothing in the statute or legislative history to suggest that the offset was designed merely to apply to such new beneficiary categories as might be recognized in the future; indeed, the only two beneficiary categories cited by appellee (Br. 23-24) that could have been known to Congress at the time — divorced wives married more than ten but less than 20 years, and divorced husbands[2] — are not even mentioned in the legislative history

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[2]Prior to the 1977 Social Security Amendments, a divorced wife was entitled to spousal benefits only if she had been married for at least 20 years. 42 U.S.C. 402(b)(1)(G), 416(d). The 1977 Amendments reduced this durational requirement to ten years, to be effective in December 1978. Pub. L. No. 95-216, § 337, 91 Stat. 1548, 42 U.S.C. (Supp. V) 402(b)(1)(G), 416(d). Thus, when it enacted the offset and exception clauses in Section 334(a) of the 1977 Amendments, Congress was well aware of this new beneficiary category that was not then entitled to spousal benefits but would become eligible for benefits in the future.

Divorced husbands became entitled to spousal benefits as a result of the June 1977 decision in *Oliver* v. *Califano*, [1977-1978 Transfer Binder] Unempl. Ins. Rep. (CCH) para. 15244 (N.D. Cal. June 24, 1977); see also 44 Fed. Reg. 34479 (1979) (regulation implementing *Oliver* on nationwide basis). The other beneficiary categories referred to by appellee were established by judicial decisions subsequent to enactment of the 1977 Amendments. See *Cooper* v. *Califano*, 81 F.R.D. 57 (E.D. Pa. 1978), and 87 F.R.D. 107 (E.D. Pa. 1980) (young husbands); *Yates* v. *Califano*, 471 F. Supp. 84 (W.D. Ky. 1979) (surviving divorced

of the offset and exception clauses, let alone identified, as appellee would have it, as the focus of the offset provision.

Nevertheless, appellee assures the Court that his proffered interpretation is "the better reading of the statute" (Br. 21). First, he contends that the gender-based standard invalidated in *Goldfarb* was " 'as inoperative as though it had never been passed' " (Appellee Br. 22, quoting *Norton* v. *Shelby County*, 118 U.S. 425, 442 (1886)) and therefore could not be incorporated in the exception clause as a requirement of the Social Security Act that was, in the language of the clause, "in effect * * * in January 1977." However, as shown in our opening brief, there can be no doubt from the text and history of the statute that Congress intended the exception clause to incorporate by reference the pre-*Goldfarb* requirements, including, in particular, the gender-based dependency test; appellee's reliance on general legal maxims does not negate the specific evidence of Congress's intent in this statute.[3] Moreover, appellee's reliance on *Norton* v. *Shelby County* is unavailing and reflects an outmoded view of the law. The Court no longer " 'indulge[s] in the fiction that the law now announced has

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fathers); 45 Fed. Reg. 68931 (1980). See also *Mertz* v. *Harris*, 497 F. Supp. 1134 (S.D. Tex. 1980) (remarried widowers); *Ambrose* v. *Califano*, [1980-1981 Transfer Binder] Unempl. Ins. Rep. (CCH) para. 17702 (D. Ore. Jan. 29, 1980) (surviving divorced husbands); 47 Fed. Reg. 12161 (1982). Surely there is no reason in the 1977 statute or its history to assume, as appellee contends, that Congress directed the offset to categories that were neither entitled nor anticipated to become entitled to benefits.

[3]The exception also refers to provisions of the Act "being administered in January 1977." This language — which is discussed below (see p. 6, *infra*) — further rebuts appellee's argument that the pre-*Goldfarb* dependency test is not incorporated in the exception clause because an unconstitutional statute is never "in effect." Indeed, Congress's formulation of the exception in terms of requirements "in effect" and "being administered" may well have been devised in anticipation of the objection that appellee now raises.

always been the law * * *.' " *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 107 (1971), quoting *Griffin* v. *Illinois*, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring in the judgment). Rather, "[t]he actual existence of a statute, prior to such a determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration." *Chicot County Dist.* v. *Bank*, 308 U.S. 371, 374 (1940). See also *Lemon* v. *Kurtzman*, 411 U.S. 192, 199 (1973) (plurality opinion). Nothing in the doctrine of retroactivity suggests that Congress could not or did not incorporate into the exception clause the gender-based dependency test in pre-*Goldfarb* law.

Appellee further argues (Br. 24-25) that the Social Security Act, as "being administered in January 1977," did not contain a gender-based dependency test for spousal benefits. This contention is incorrect and is refuted by the very authority cited by appellee. As the relevant Social Security Claims Manual states, "[t]he current law requires that claimants for (widower's) (husband's) benefits meet a one-half support requirement. * * * [While that requirement has been challenged], the law remains unchanged and no payment can be made until a final decision has been rendered on the constitutionality of the one-half support requirement. * * * [N]o payment may currently be made * * *." Social Security Administration Claims Manual Transmittal No. 3844 (July 14, 1976). That the Social Security Administration was holding claims until "the issue is finally resolved" (*ibid.*) does not, as appellee suggests, alter the fact that the spousal benefits provisions were "being administered in January 1977" in accordance with the requirements set forth by Congress in the Act and that no spousal benefits were being paid to male claimants who failed to demonstrate one-half dependency on their wives.

Nor, finally, does *Gebbie* v. *United States Railroad Retirement Board*, 631 F.2d 512 (7th Cir. 1980), support appellee's interpretation of the exception clause (see Appellee Br. 23 n.16). In that case, Congress provided in the Railroad Retirement Act of 1974 that dual benefits under both the railroad retirement and Social Security programs could be paid if the applicant was entitled to Social Security benefits under the law "as in effect on December 31, 1974" (45 U.S.C. 231b(h)(3)). The court of appeals concluded that this language did not incorporate the dependency test that was, subsequent to enactment of the statute, invalidated in *Goldfarb*. *Gebbie*, however, involved an entirely different statute from the one at issue here and sheds no light on Congress's intent in enacting the exception clause; in particular, the 1974 statute involved in *Gebbie* preceded this Court's decision in *Goldfarb*, and there was no evidence in that case, as there is in this, that Congress framed the statute—including its operative date — to incorporate the requirements of the Social Security Act as they existed prior to *Goldfarb*.[4]

2. In our opening brief we showed (Gov't Br. 27-42) that Congress, in enacting the pension offset provision, adopted the exception clause in order to protect the reliance interests of retirees who had planned their retirements under pre-*Goldfarb* law. Because the protection of reliance interests is

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[4]Following *Gebbie*, Congress amended the Railroad Retirement Act to eliminate dual benefits for claimants whose entitlements had not been determined by August 13, 1981. 45 U.S.C. (Supp. V) 231b(h)(6). In enacting this amendment, Congress made clear its disapproval of the decision in *Gebbie*. See, *e.g.*, H.R. Conf. Rep. 97-208, 97th Cong., 1st Sess. 863 (1981). This amendment has been upheld against a challenge, similar to the one in this case, that it "grandfathered" in people who had qualified under the gender-based standard and therefore violates the Due Process Clause. See *Frock* v. *United States Railroad Retirement Board*, 685 F.2d 1041, 1046-1049 (7th Cir. 1982), cert. denied, No. 82-756 (Feb. 22, 1983); *Givens* v. *United States Railroad Retirement Board*, No. 82-2183 (D.C. Cir. Oct. 28, 1983).

a legitimate and important governmental objective,[5] and because the exception clause is narrowly tailored and substantially related to the achievement of that objective and is not based on archaic and inaccurate sexual stereotypes, the exception does not violate due process. See also *Lehr* v. *Robertson*, No. 81-1756 (June 27, 1983), slip op. 17-19.

Although appellee acknowledges that the protection of reliance interests is a legitimate and important governmental objective (Appellee Br. 29 n.21, 38), he contends that the exception clause (if construed to incorporate a gender-based standard) is unconstitutional (*id.* at 25-39). Appellee argues that " '[s]ex is exactly what . . . [the exception clause] is based on' " (*id.* at 26 (brackets and omission in original), quoting *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 713 (1978)), and he emphasizes that men and women are treated differently under the exception (Appellee Br. 3, 26, 28, 31-32). These observations, however, merely state but do not resolve the issue of the validity of the gender-based standard in the exception clause.

Nor is this case controlled, as appellee suggests (Br. 37-39), by the decision in *Goldfarb*. As we discussed in our opening brief (Gov't Br. 31, 42 n.30), *Goldfarb* arose in a much different context and involved quite different considerations that distinguish it from the present case. Nothing in *Goldfarb* compels the conclusion that the exception clause—which substantially serves legitimate and important governmental objectives and does not reflect a sexist

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[5]See *Arizona Governing Committee* v. *Norris*, No. 82-52 (July 6, 1983), slip op. 1-2 (per curiam); *id.* at 11-13 (Powell, J., concurring in part and dissenting in part); *id.* at 3-5 (O'Connor, J., concurring); *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457 (1978); *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 803-809 (1978).

motivation or discredited assumptions about women — violates due process.[6]

Appellee contends that the protection of "gender-based reliance interests" under pre-*Goldfarb* law is "not an important governmental objective" (Br. 28). We do not think — and, more importantly, Congress did not think — that the interests of retirees can be so easily dismissed. People — both men and women — eligible under pre-*Goldfarb* law were entitled to plan their retirements in accordance with the longstanding statutory provision for unreduced spousal benefits that had been duly enacted by Congress.[7] That a closely divided Court ultimately invalidated this provision on equal protection grounds neither detracts from the good-faith reliance on the statutory entitlement while it was in effect nor discredits Congress's effort to protect such reliance interests by means of the exception to the offset. See cases cited at pp. 5-6, *supra*. Notwithstanding appellee's contention (Br. 28, 38), the protection of reliance interests that reflect previous gender discrimination is not an illegitimate or unimportant governmental objective. See *Arizona Governing Committee* v. *Norris*, slip op. 1-2 (per

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[6]For these reasons, appellee's characterization that "[t]he exception clause is a legislative attempt to reinstate a provision previously held unconstitutional" (Br. 37) is incorrect. Furthermore, Congress has not sought to override the decision in *Goldfarb*, and indeed it amended the Social Security Act to remove the sections struck down by the Court (see Gov't Br. 2). Thus, nondependent men are eligible for spousal benefits, with the amount of the benefit determined in light of the offset and exception clauses (and nondependent men who filed valid applications for spousal benefits before December 1977 are entitled to dual pension and Social Security benefits without regard to the offset).

[7]See Gov't Br. 33-34 & n.21. See also 123 Cong. Rec. 35396-35397 (1977) (remarks of Rep. Rousselot in connection with the formation of a national commission on Social Security problems) ("the average wage earner today treats his social security taxes as a pension investment and reduces his private savings accordingly"); cf. *Arizona Governing Committee* v. *Norris*, slip op. 4 (O'Connor, J., concurring).

curiam); *id.* at 11-13 (Powell, J., concurring in part and dissenting in part); *id.* at 3-5 (O' Connor, J., concurring); *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. at 718-723; see also *Kirchberg* v. *Feenstra*, 450 U.S. 455, 459 (1981); *id.* at 463 (Stewart, J., concurring in the result).

Appellee's brief also reveals a misunderstanding of the nature of this reliance. Contrary to his repeated statements (Br. 28-29 & n.21, 31-32), the relevant reliance interest is that of retirees who *planned* their retirements in accordance with pre-*Goldfarb* law. Thus, one cannot merely look, as appellee suggests, to the law in effect at the moment of retirement, and it is simply incorrect to conclude that people who retired after *Goldfarb* had not relied on pre-*Goldfarb* law (Appellee Br. 28, 31). Rather, as Congress clearly recognized, planning for retirement occurs over a long period of time and cannot be abruptly changed; accordingly, the exception was designed to "avoid[] penalizing people who are already retired, or close to retirement, from public employment and who cannot be expected to readjust their retirement plans to take account of the 'offset' provision that will apply in the future." H.R. Conf. Rep. 95-837, 95th Cong., 1st Sess. 72 (1977); S. Conf. Rep. 95-612, 95th Cong., 1st Sess. 72 (1977).[8]

Appellee finally contends (Br. 33-37) that the exception clause is fatally underinclusive because it does not protect the reliance interest of men who might have relied on *Goldfarb* in retiring during the nine-month period between that

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[8]Furthermore, in light of the nature of retirement planning, Congress's choice of a five-year transitional period for the exception clause was reasonable and appropriate (see Gov't Br. 39), and appellee's unsupported suggestions to the contrary (Br. 32, 34-35) are without merit.

decision and enactment of the offset statute.[9] Viewed in context, however, this claim of underinclusiveness does not render the exception unconstitutional.

As we showed in our opening brief (Gov't Br. 20-27, 32-34, 38-40), the exception clause was designed to protect the reliance interests of retirees who had planned their retirements in accordance with pre-*Goldfarb* law, under which they were entitled to receive unreduced spousal benefits as well as government pension payments. This entitlement was based on statutory provisions that Congress had passed in 1939 and that had remained in effect since that time. See Social Security Act Amendments of 1939, Pub. L. No. 379, ch. 666, 53 Stat. 1360. In view of this longstanding statutory entitlement, Congress could properly determine that retirement plans made under pre-*Goldfarb* law should be safeguarded from the offset and that such plans in all likelihood reflected the anticipated receipt of unreduced spousal benefits. In contrast, at the time the exception was under consideration in Congress, *Goldfarb* had only recently been decided and thus was unlikely to have led to widespread and substantial reliance by nondependent men. Moreover, there existed the possibility—as in fact occurred—that Congress would pass legislation in response to *Goldfarb* and the resulting financial burden on the Social Security trust fund[10] and that such measures

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[9]Appellee studiously avoids stating directly that he in fact set his retirement for November 1977 in reliance on *Goldfarb*. See Appellee Br. 2, 26 n.18, 32, 36. We also point out that many members of the class to whom the district court awarded relief (see Gov't Br. 7, 10) may not in fact have relied on *Goldfarb* and therefore do not have the reliance interest that appellee urges as the basis for finding the exception to be unconstitutionally underinclusive.

[10]An extension of benefits to remedy unconstitutional underinclusiveness, as in *Goldfarb*, is a "task [that] is essentially legislative," in which the court acts as a "short-term surrogate for the legislature." Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 Clev. St. L. Rev. 301, 317 (1979); see also *id.* at

would affect the newly-recognized claims of nondependent men to unreduced benefits.[11] For these reasons, it was not improper for Congress to confine the exception clause to pre-*Goldfarb* reliance interests that it considered most worthy of protection and to exclude whatever limited reliance there might have been in the brief period between *Goldfarb* and the offset. And there can be no doubt that the exception is precisely suited to the protection of those pre-*Goldfarb* reliance interests (see Gov't Br. 38-40).[12]

321, 324. Thus, a court's belief as to what the legislature would have intended is necessarily subject to the overriding authority of the legislature to say what it in fact intended.

[11]Immediately following *Goldfarb*, proposals were made to ameliorate the financial consequences of that decision. Congressional hearings on various alternatives were held in May, June, and July of 1977, including the alternative of eliminating the dual pension and spousal benefits that resulted from *Goldfarb*. See Gov't Br. 19-20, 40. The Senate bill that contained the offset provision (see Gov't Br. 19 n.9) was reported out of committee on November 1, 1977 (S. Rep. 95-572, 95th Cong., 1st Sess.), and was passed by the Senate on November 4, 1977 (123 Cong. Rec. 37200). The offset was signed into law as part of the Social Security Amendments on December 20, 1977 (Pub. L. No. 95-216, § 334, 91 Stat. 1544). This prompt development of the offset in the wake of *Goldfarb* qualifies the substantiality of any reliance interest that appellee and his class members may claim during the brief interim between the *Goldfarb* decision and enactment of the offset provision. See *Hospital Association of New York State, Inc.* v. *Toia*, 577 F.2d 790, 797-798 (2d Cir. 1978); cf. *FHA* v. *The Darlington, Inc.*, 358 U.S. 84, 91 (1958).

[12]Furthermore, as discussed in our opening brief (Gov't Br. 39-42 & n.29), the exception clause rests on a "reasoned analysis" (*Mississippi University for Women* v. *Hogan*, No. 81-406 (July 1, 1982), slip op. 7) in which Congress considered and rejected alternative approaches that it considered less desirable. See also Congressional Research Service, Library of Congress, Report No. 83-111 EPW, *The Government Pension Offset in Social Security* 39-46 (Mar. 24, 1981, updated June 17, 1983) (discussion of the policies underlying the exception clause and various alternatives). Indeed, after the five-year transitional period for the exception clause ended in December 1982, Congress twice revisited

In any event, to the extent that Congress was obligated to take into account post-*Goldfarb* reliance, the exception clause is nonetheless constitutional because it is substantially related to the objective of protecting reliance interests. The exception applies to those people — whether male or female — who were eligible for spousal benefits under pre-*Goldfarb* law and thus were entitled to plan their retirements in accordance with that law. In addition, in light of the effective date of the statute, nondependent men who submitted a valid application for spousal benefits prior to December 1977 are not subject to the offset, and therefore any reliance by such men on the *Goldfarb* decision has been accommodated in the statute (see Gov't Br. 4, 27 n.16, 39 n.28). Conversely, divorced wives married more than ten but less than 20 years — the only category of women who were eligible for benefits after 1977 but not before (see p. 4 & n. 2, *supra*) — do not come within the exception and hence are covered by the offset. And, most importantly—and appellee nowhere disputes the validity of this application—the exception does not apply to nondependent men who became eligible for spousal benefits in or after December 1977 and who make no claim that their retirement plans were based on the change in law caused by *Goldfarb*. Accordingly, it can be seen that there are men and women on both sides of the offset line and that the distinguishing characteristic is the reliance interest of each group.

Against this background, appellee's argument that the exception clause is impermissibly underinclusive must fail. His argument rests on the exclusion from the exception of the particular category of nondependent men who allege

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the Act and adopted gender-neutral provisions in place of the original exception. See Gov't Br. 5 n.4; compare Appellee Br. 35 n.26. Thus, once the exception had adequately served to protect the reliance interests formed under pre-*Goldfarb* law, Congress no longer found it necessary to use a gender-based standard.

that they relied on *Goldfarb* in making their retirement plans between March-December 1977 and who did not submit a valid application for spousal benefits prior to the December 1977 effective date of the offset provision. Even accepting appellee's argument that this category should have been included in the exception, its omission falls far short of showing that the statute has "no substantial relation" (*Lehr* v. *Robertson*, slip op. 18) to the desired objective. A legislative classification, even one involving gender, need not attain a standard of perfection in order to be upheld. The line drawn by the exception clause is not unconstitutional gender discrimination.[13]

Moreover, the new-found and short-lived interest under *Goldfarb* that is asserted by appellee is plainly less deserving of protection than that of the groups that are exempt from the offset. Clearly appellee's claim to an exception is less substantial than the longstanding interest of those who were entitled to rely on the provisions of the Social Security Act in effect prior to *Goldfarb*. Similarly, appellee's claim is less significant than that of people who were already receiving spousal benefits by December 1977 or at least had submitted a valid claim for such benefits. Finally, in contrast to the objective criteria now embodied in the offset and exception provisions, appellee's claim is defined in terms of subjective reliance on *Goldfarb*, a standard that would be quite difficult for the government to apply in practice and largely self-determining by those seeking to invoke the exception clause. In light of these considerations, the exception clause is not unconstitutionally underinclusive.

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[13]Cf., *e.g.*, *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980); *Vance* v. *Bradley*, 440 U.S. 93 (1979); *Califano* v. *Aznavorian*, 439 U.S. 170, 174-175, 178 (1978); *Califano* v. *Jobst*, 434 U.S. 47 (1977); *Califano* v. *Webster*, 430 U.S. 313, 321 (1977); *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976); *Mathews* v. *Diaz*, 426 U.S. 67, 82-84 (1976); *Weinberger* v. *Salfi*, 422 U.S. 749, 769-770 (1975).

3. The severability clause in the exception provision states that, if the exception is held invalid in any respect, the offset shall remain in effect and the exception shall be considered invalid in its entirety (see Gov't Br. 43-44). The purpose of this severability clause, as its language and legislative history demonstrate, was to ensure that the exception would be nullified rather than extended in the event a court found it to be invalid as written (see *id.* at 44-45).

Appellee challenges the severability clause on the ground that it "unconstitutionally obstructs the exercise of judicial review" (Br. [redacted]). In particular, he asserts that it "purports to preclude members of appellees' class from receiving any relief from the unconstitutional injury inflicted on them by the exception clause" and that it "purports to curtail the jurisdiction of the federal courts to review the constitutional claim of appellees' class by withdrawing the class' standing to sue" (*id.* at 43).

Appellee fundamentally misconceives the purpose and effect of the severability clause.[14] As discussed in our opening brief (Gov't Br. 46-50), the severability clause does not prevent the entry of relief in appellee's favor or render an adjudication of his rights a " 'gratuitous * * * exercise of

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[14]Without citation to the legislative history, appellee asserts that Congress must have been "aware that the effect of the clause would be to stifle incentive to challenge the gender-based dependency test enacted in the exception clause" and must have "know[n] that this disincentive would work to assure that the harsh remedial choice envisioned by the severability clause would never have to be invoked" (Appellee Br. 55). Appellee therefore asserts that the severability clause is "a legislative 'bluff' " that should be "called" by this Court (*ibid.*). We are aware of no support for appellee's assertions, and this Court has recently noted that even in a First Amendment context it is "reluctan[t] to attribute unconstitutional motives to the [legislature], particularly when a plausible * * * purpose for the [legislative] program may be discerned from the face of the statute." *Mueller* v. *Allen*, No. 82-195 (June 29, 1983), slip op. 6.

judicial power' " (Appellee Br. 50, quoting *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976)); nor does it restrict the jurisdiction of the federal courts or foreclose judicial review by depriving appellee of standing. Congress has simply provided a substantive rule of law to govern the disposition of litigation like that brought by appellee. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 684-685 (1981). Appellee's attack on the severability clause hinges on his failure to appreciate that his constitutional right is to be free from impermissible gender discrimination, not to receive dual benefits under the government pension and Social Security systems. By obtaining judicial relief invalidating the gender-based exception clause, appellee has fully vindicated his right to equal protection.[15]

The crux of appellee's argument is his insistence that extension rather than nullification of benefits is the constitutionally required remedy in equal protection cases. This Court's decisions are expressly to the contrary. " 'Where a statute is defective because of underinclusion * * * there

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[15]Appellee contends that, "by virtue of the article III powers of the federal courts and by the very nature of the constitutional right itself," he is "entitled to an adequate remedy * * *" — meaning financial compensation — for the "tangible harm * * * [of] the loss of social security spousal benefits" (Appellee Br. 47, 53). Beyond the fact that appellee's substantive right is to equal treatment and not to dual benefits, we are aware of no support for the extraordinary claim that monetary relief must follow from every legal wrong. See, *e.g.*, *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982) (absolute immunity). On the contrary, as we discussed in our opening brief, the doctrine of sovereign immunity (Gov't Br. 48-49) and the principle that equal protection violations can be cured by the nullification rather than the extension of benefits (*id.* at 49-50) illustrate that no such requirement exists. Appellee's confusion is demonstrated by his heavy reliance on *Bivens* v. *Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and its progeny, which were not suits against the federal government and which therefore raised no issue of sovereign immunity.

exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to those who are aggrieved by the exclusion.' " *Califano* v. *Westcott*, 443 U.S. 76, 89 (1979), quoting *Welsh* v. *United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in the result). Thus, "[i]n every equal protection attack upon a statute challenged as underinclusive, the State may satisfy the Constitution's commands either by extending benefits to the previously disfavored class or by denying benefits to both parties." *Orr* v. *Orr*, 440 U.S. 268, 272 (1979). See also *Craig* v. *Boren*, 429 U.S. 190, 210 n.24 (1976). Contrary to appellee's contention, the alternative of nullification does not deprive a plaintiff of standing or raise any other Article III issues. See *Orr* v. *Orr*, 440 U.S. at 273; *Stanton* v. *Stanton*, 421 U.S. 7, 17 (1975); Gov't Br. 47-50.

Nor is a different conclusion compelled because the severability clause indicates Congress's intention that the exception, if invalid as drafted, should be nullified in its entirety rather than "broadened to include persons or circumstances that are not included within it." H.R. Conf. Rep. 95-837, at 72; S. Conf. Rep. 95-612, at 72; see Gov't Br. 44-45. Severability turns on "the intent of the lawmakers * * *. [It] presents a question of statutory construction and of legislative intent." *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 312, 313 (1936). Here Congress has simply "defined its intent as to separability" (*Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 434 (1938)) and made clear that the exception clause should be eliminated altogether if it cannot be limited to those who Congress believed to be most deserving of its protections. It is peculiar, to say the least, to suggest that because Congress removed any "hesitation or doubt" about its intent (*Hill* v. *Wallace*, 259 U.S. 44, 71 (1922)) — which might otherwise have been difficult to

determine in light of Congress's opposing objectives to protect the reliance interests of retirees and to avoid a financial burden on the Social Security trust fund — the severability clause violates notions of separation of powers.[16]

A severability clause "does not give the court power to amend the [statute]" (*Hill* v. *Wallace*, 259 U.S. at 71) or "to give the statute 'an effect altogether different from that sought by the measure viewed as a whole' " (*Carter* v. *Carter Coal Co.*, 298 U.S. at 313; citation omitted). See also *id.* at 316; *Sloan* v. *Lemon*, 413 U.S. 825, 834 (1973); *Califano* v. *Westcott*, 443 U.S. at 94 (Powell, J., concurring in part and dissenting in part); *Welsh* v. *United States*, 398 U.S. at 365-366 & n. 18 (Harlan, J., concurring in the result). By extending the exception clause without regard to dependency or reliance interests, the district court has restructured the Social Security Act in a way that Congress clearly foreclosed. In so doing, it breached " 'the duty of all courts to observe the conditions defined by Congress for charging the public treasury.' " *Schweiker* v. *Hansen*, 450 U.S. 785,

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[16]Appellee acknowledges (Br. 53) that, if the district court's judgment is upheld in this case, Congress could "abolish[] the exception clause entirely * * * [by] a prospective repeal." But the severability clause itself was designed to indicate Congress's intent to have an offset provision without an exception clause in the event the exception it enacted is held to be invalid. Thus, appellee's challenge to the severability clause comes down to the proposition that, as a matter of constitutional imperative, the Social Security trust fund must bear the financial burden of unreduced spousal benefits until Congress affirmatively acts to repeal the exception. Contrary to this contention, nothing in the Constitution requires such a drain on the limited funds available for Social Security payments. It surely is not improper for Congress to seek to limit benefits to a particular group without exposing the public treasury to great liability if it turns out that the chosen classification is invalid; yet, under appellee's view, Congress has no means available to effectuate this reasonable objective.

788 (1981), quoting *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 385 (1947). If the exception clause is held to be unconstitutional, it should be invalidated in its entirety, as Congress intended, rather than extended to appellee and the class he represents.

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the district court should be reversed.

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Solicitor General

NOVEMBER 1983

DOJ-1983-11